Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

SHELLY L. MANN; ROBERT W. THORSON, individually and as representatives of the class, and BEVERLY KISH,

Petitioners,

-vs-

PATRICK J. CONLIN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the complaint, filed under Title 42 §1983, alleging the adoption of unconstitutional rules, acts done without subject matter jurisdiction, and administrative acts, by a state court judge, should have been dismissed based on judicial immunity.

2. Whether the Younger doctrine bars an action for declaratory judgment and injunctive relief in Title 42 § 1983 cases.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Shelly L. Mann, Robert W. Thorson, and Beverly Kish, on behalf of themselves, and, on behalf of the class they desire to represent, respectfully petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit in this case, docket No. 93-1395, is reported at 22 F 3d 100 (1994). (Appendix, infra, pages 1a - 11a)

The Order of Dismissal, which includes the Opinion, in the United States District Court for the Eastern District of Michigan is unreported.

JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit was decided and filed on April 15, 1994.

Title 28 U.S.C. §1254(1) confers jurisdiction on the United States Supreme Court to review the Judgment in question by writ of certiorari.

STATUTES AND CONSTITUTIONAL PROVISIONS

42 USCS § 1983 as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

42 USCS § 1988 as follows:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and the Title "CIVIL RIGHTS" and the Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986] . . ., the court, in its discretion, may allow the prevailing party, other than the United States, as reasonable attorney's fee as part of the costs."

U. S. Constitution, 14th Amendment:

Section 1. All persons born or

naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisidction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners, individually, and representing a class of plaintiffs, are persons, identified, generally, as persons appearing before the defendant, a state court judge, who promulgates rules, and engages in conduct, in his court room and in conducting court business, resulting in repeated violations of constitutional rights. The defendant, as a circuit judge, is acting under color of state law.

The complaint alleges that while some of the violations of constitutional rights

occur while the judge is performing an adjudicatory function, the most serious violations are administrative in function, are legislative (rule-making) on subjects for which the defendant lacks subject matter jurisdiction to make such rules, or adjudicative when the judge lacks subject matter jurisdiction.

The applicable statutory provisions, for subject matter jurisdiction in the District Court, for injunctive and declaratory relief and for damages, are 42 U.S.C. § 1983, 28 U.S.C. §§ 1331 and 1343, and 28 U. S. C. §§ 2201 and 2202 to secure rights, privileges, and immunities secured by the United States Constitution. Attorney fees are authorized for actions under 42 USC § 1983 by 42 USC § 1988.

Plaintiffs Mann and Thorson filed an Amended Complaint before service on

Defendant (to correct minor errors). To avoid confusion, it will be referred to herein as the "Complaint," not "Amended Complaint". Defendant, without answering, filed a Motion for Judgment on the Pleadings, along with a Notice of Hearing that the motion would be heard on a date and time to be set by the Court. Plaintiffs answered the motion. Defendants filed a reply. The District Judge never set a date for a hearing. No oral arguments were held.

Proposed Intervenor Kish filed a Motion to Intervene. Defendant answered the motion. No date was set for hearing this motion by the Court.

The District Judge granted defendant's Motion for Judgment on the Pleadings in an order entitled "Order of Dismissal" signed 2/12/93. The Order of

Dismissal was a final order that disposed of all of the plaintiffs' claims, including the claims of Appellants Mann and Thorson, the class of plaintiffs they proposed to represent, and the claim of Proposed Intervenor Kish. Appellants filed a timely appeal of right to the United States Court of Appeals for the Sixth Circuit pursuant to 28 USCS § 1292(a) on March 11, 1993.

Since the District Judge dismissed the case for failure to plead a cause of action, the facts pleaded in the complaint are taken as true and form the factual basis for this Petition for Writ of Certiorari.

This complaint pleads a class action, seeking damages, declaratory and injunctive relief, against a state court judge. The complaint alleges the

constitutional violations, under color of state law, to state a cause of action under Title 42 §1983.

While the named plaintiffs request damages caused by the violations of their constitutional rights, the declaratory judgment and injunctive relief requested is primarily for the benefit of the class. (See paragraphs 6-18 of complaint, appendix B, pages 15a to 27a)

The complaint pleads "frequent" and "repeated" violations of the litigants' constitutional rights, especially in the area of family law. The nature of these constitutional violations are such that the right of appeal does not remedy the wrong. This is true primarily for two reasons, (1) constitutional violations, such as requiring a litigant to pay money before he can have hearing (to which the

litigant is entitled), would be moot issues before it could be heard on appeal; and (2) when the defendant judge is reversed on appeal, he does not change his practices, his own rules, however wrong they may be.

The constitutional violations alleged include, especially, denial of due process rights, including denial of the right of access to the courts. (See paragraphs 8-10 of the complaint, appendix B, pages 16a-20a)

In anticipation of the defense of judicial immunity, the complaint alleges (1) that the judge's acts were administrative, (2) that if the acts were in a judicial function, that he acted without subject matter jurisdiction, (3) that his acts amounted to rule-making, rules for all cases before him,

administrative rules that he had no jurisdiction to make, and which violate constitutional rights. (paragraph 11, Appendix, pages 20a-24a)

The rule-making power is vested in the legislature or the Michigan Supreme Court. The complaint alleges that these are rules applied to plaintiffs, generally, in similar circumstances, and not specifically to the named plaintiffs, who are only 3 of the victims.

The best specific example, as pleaded, is a rule in defendant's court that, in spite of the law that a judge cannot implement a friend of the court recommendation for a change in custody until after a hearing is held, this defendant judge always implements the recommendation, and then has a hearing. (see Complaint, paragraph 36d, and

Complaint of Intervening Plaintiff Kish, paragraph 7, Appendix C, page 56a) This practice is expressly prohibited by Michigan law. (See Mann v Mann, appendix D, page 66a) The complaint alleges that the defendant judge followed this rule in Shelly Mann's case. By the time that there was a hearing, as it was with Shelly Mann, the damage was already done. See Mann v Mann, 190 Mich App 526, 529, 476 NW2d 439 (1991) [Appendix D, page 69a] wherein the Michigan Court of Appeals states as follows:

"The court further explained that it was the court's practice under these circumstances to adopt and implement the recommendation until the hearing de novo could be held."

Another example is that in Shelly Mann's case, the judge insisted upon

holding a hearing while the jurisdiction was vested by Michigan Court Rule [MCR 7.208(A)] in the Court of Appeals. Because the undersigned attorney persisted the judge phoned the Court of Appeals and temporarily stopped the hearing. Intervenor Kish was not so fortunate, orders were entered in her case by the defendant judge for almost two years, seriously and adversely affecting her life, while the jurisdiction was vested in the Michigan Court of Appeals. (See, paragraph 4, Appendix C, page 54a)

Plaintiff Thorson's claim, as pleaded, alleges three incidents when the defendant judge stated that he could have a hearing (due process rights and right of access to the courts) only after he had paid money. On one occasion the defendant judge ordered that he would hold a hearing

on the issue of whether or not a proposed order conformed to a prior record only if Thorson paid $500 to his wife's attorney by noon of that same day. He did not have the money; therefore, the order was signed without any hearing as to whether or not the order conformed to the previous court record.

These practices are administrative. They are not orders made in the process of adjudicating. Discovery in the case (if it is re-instated) is likely to produce more evidence that these are rules and practices in the defendant's court.

The District Judge ruled that the defendant is entitled to absolute judicial immunity and that the court would abstain under the Younger doctrine with regard to the prospective declaratory and injunctive relief requested. The United States Court

of Appeals for the Sixth Circuit affirmed on both issues.

Plaintiffs claim that both the District Court and the Court of Appeals failed to consider the complaints in a light most favorable to plaintiffs in that they ignored the allegations of the complaint that plead a cause of action for which there is no judicial immunity, and the Younger Doctrine does not apply to a Title 42 § 1983 case, especially when the plaintiffs request prospective declaratory and injunctive relief against the practices of the court as compared to an actual interference with a pending state proceeding, which is not requested.

REASONS FOR GRANTING THE PETITION

I. This is a nationally important case.

There are conflicting decisions among the circuits on the questions presented, and the judgment of the Court of Appeals is erroneous; however, it is the opinion of this brief writer that the most important reason for granting the petition is the national importance of the issues. This should present a relatively rare opportunity for this Court to address the available remedies for litigants wronged, and a class of litigants likely to be wronged in the future by a state court judge, upon facts taken as true from an unanswered complaint. It is that consideration that has encouraged the filing of this Petition, and strongly

supports the granting of a writ of certiorari.

The responsibility of the judiciary, and the bar, in these times is awesome. The temptation to shrink from that responsibility is great. Often I tell my friends that lawyers are paid fighters. While I do not like to think of myself that way, I do see the benefit from sane, controlled fighting in the courts, with trained lawyers and judges, following rules. The alternative is fighting in the streets, as people take the law into their own hands. Why? Because the legal system is currently in a downswing - failing to meet its awesome responsibility.

If our leadership at the bar, especially our judges, can not handle that responsibility, and administer justice according to the Constitution, laws, and

rules, then I question whether or not our judges deserve any judicial immunity, and that the entire subject should be revisited with the goal of achieving more balance between the right of the judiciary to remain independent, and the right of the public to obtain redress of wrongs when the wrongs are caused by the very arm of our government charged with the responsibility of the enforcement of rights.

This Court knows how to balance rights. On the one hand we need judicial immunity to remove a judge's "fear that unsatisfied litigants may hound him with litigation charging malice or corruption." Pierson v Ray, 386 U.S. 547, at 554, 87 S Ct at 1218; Finale v Sheehy, 385 F 2d 866 (1967). On the other hand we should "allow absolute immunity to extend no

further than is absolutely necessary to protect the integrity of an official's decision making process." Johnson v Kegans, 870 F2d 992 (5th Cir. 1989).

Judge Conlin's rules are administrative - not substantive - not adjudicative - not in the process of decision making. The Court of Appeals must have misunderstood when they said "the fact that a judge's orders follow a certain pattern does not automatically convert them into 'rules'." We never alleged a "pattern" such as a judge always deciding for the mother in a custody case. His rule is to implement the recommendations of the friend of the court, whatever they are or whoever they are for, and then hold the hearing, hear the evidence, later. Or, as in Plaintiff Thorson's case, pay money now, and then,

after you do, I'll hear your case. They are rules (contrary to law and the Constitution) not a pattern. And I am appalled that Justice Boggs would liken that practice of Judge Conlin to the opinions of the justices of this Court on the death penalty, citing Callins v. Collins, 114 S Ct 1127, 1130 (1994) and Sullivan v Askew, 434 U.S. 878, 98 S Ct 232 (1977). [See Appendix A, page 9a]

These litigants are not criminals - yet this judge tries them on out of court recommendations and whether or not they can pay - without a trial. And it is in the area of family law where judges need to act almost as if they were social engineers. They are called upon to make decisions having major impact on the private lives of children and law-abiding citizens who would not be in court but for

the breakdown of their families. Procedural rules and guidelines are set forth to guide lower court judges in their Solomonic tasks. When a judge such as Judge Conlin systematically ignores those rules and guidelines and instead uses rules of his own ("Conlin law") that abort the safeguards of process and deny the rights of parties, and the appeal process is insufficient remedy, then we have a serious problem that must be addressed. Such rules are like imposing the death penalty, and having the execution, on the recommendation of the police, before there are any proceedings in court. While that is an exaggeration, wasn't that the original reason for the §1983 legislation - preventing lynching under color of law.

This case is especially important, to me as a principled attorney, and to the

citizens of our nation who do not know what to do to protect themselves, to withstand the unbridled wielding of power by a judge who does not accept that he is obligated to administer his court room, if not with psychological understanding and kindness (as would be ideal), but at least with a minimum respect for people, for the United States Constitution, for law, and for rules, time tested, and duly adopted.

The complaint, and the intervening plaintiff's complaint, plead a cause of action under Title 42 USC §1983. These are not pro se complaints, the plaintiffs are not disgruntled litigants. This case involves serious charges against a judge who, as alleged, is doing a lot of harm, to a lot of people.

II. The granting under FRCP 12(b)(6) of the motion to dismiss by the District Court and affirmed by the Court of Appeals was erroneous and in conflict with Conley v Gibson, 78 S Ct 99, and a better reasoned opinion of the Fifth Circuit.

The standard for deciding whether or not to dismiss a complaint for "failure to state a claim upon which relief can be granted", pursuant to FRCP 12(b)(6), was established by the United States Supreme Court in Conley v Gibson, (1957) 355 US 41, 2 L Ed 2d 80, 78 S Ct 99. This Court held as follows:

"a complaint should not be dismissed for failure to state a cause of action unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled

him to relief." 355 US 41, at 45-46.

FRCP 15(a) provides in part that leave to amend "shall be freely given when justice so requires." FRCP 15(a) and Stern v United States Gysum, Inc., 547 F2d 1329 (7th Cir 1977).

The District Court cited Westlake v Lucas, 537 F2d 857 (6th Cir 1976) and stated its understanding of the law as follows:

"In reviewing a motion to dismiss, all allegations are taken as true and the complaint is construed in the light most favorable to plaintiff." (R.9, Order of Dismissal, p. 2, Record p. 83)

The District Court's dismissal of the plaintiffs' complaints based upon FRCP 12(b)(6) was clearly erroneous. The Court of Appeals paid lip service to the law established in Conley v Gibson, supra.,

and then proceeded to interpret the facts as they wished them to appear to support the dismissal based on judicial immunity.

This is not a case where the dismissing judge ruled that a particular allegation was missing from the complaint. It is rather a case where the judges of both the District Court and the Circuit of Appeals chose to adopt their own theory from the complaint (ignoring other allegations) and fitting them into a posture that would support an opinion to dismiss. This treatment conflicts the law as stated by this Court in Conley v Gibson, supra, and with the Fifth Circuit in Elliott v Perez, 751 F2d 1472 (1985). In the Elliott case the dismissal by the district judge "prior to any discovery or responsive pleadings" was vacated and remanded. The case contains a discussion

pleadings and the contrary, the need for specific facts upon which to base the granting or denial of dismissal based upon a claim of judicial immunity.

The solution found by the Fifth Circuit makes much sense to me. Reference is made in the Elliott case, 751 F2d at 1481, to the fact that counsel for plaintiff, in signing the complaint "is affirming that, after reasonable inquiry, he believes in good faith that the defendant official can not successfully show he has the defense of immunity." Facts are pleaded to defend against the anticipated defense of judicial immunity. If, however, the complaint was not specific enough, then, the district judge, as suggested in the Elliott case, 751 F 2d at page 1482, "should <u>on its own</u> require of the plaintiff a detailed complaint

alleging with particularity all material facts on which he contends he will establish his right to recovery, which will include detailed facts supporting the contention that the plea of immunity cannot be sustained." [emphasis added]

Plaintiffs in this case never had the benefit of the judicial analysis required by Conley v Gibson, supra, nor the opportunity to defend against summary dismissal that the Elliott court would have afforded them.

Why did the District Court Judge throw the damage claim out based on judicial immunity when the complaint pleads facts in avoidance of judicial immunity? Why did the Sixth Circuit, in affirming the District Court treat the case so differently than it was pleaded? Why did the Sixth Circuit rule that there

are no set of facts under which the plaintiffs could prevail, and state, categorically, that the facts of this case do not rise to the level of rule-making. Are not these matters to be resolved at a trial? Are we, as members of the bar, that afraid to police ourselves that we need to quickly dispose of cases against judges? As stated in Elliott v Perez, supra it was the "Quick Abort in Federal Court."

III. The Court of Appeals opinion with regard to its understanding of the law and the application of judicial immunity to this case is erroneous and in conflict with decisions of this Court and other Circuits.

The law regarding judicial immunity

has been developing in this Court over many years. Stump v Sparkman, 435 US 349, 55 L Ed2d 331, 98 S Ct 2862 (1978); Bradley v Fisher, 80 US 335, 20 L Ed 646 (1872); Pierson v Ray, 386 US 547, 18 L Ed 288, 87 S Ct 1213 (1967); Butz v Economou, 438 US 478, (1978); Supreme Court of Virginia v Consumers Union, 446 US 719, 64 L Ed2d 641, 100 S Ct 1967 (1980); Pulliam v Allen, 466 US 522, 80 L Ed2d 565, 104 S Ct 1970 (1984); Forrester v White, 484 US 219, 98 L Ed2d 555, 108 S Ct 538 (1988); Mireles v. Waco, 112 S Ct 286, 116 L Ed 2d 9 (1991); and Antoine v. Byers & Anderson, Inc., 508 U S ____, 124 L Ed 2d 391, 113 S Ct 2167 (1993).

In Forrester v White, supra, this Court held that, in deciding whether or not there is immunity, an analysis of the function must be made. For example, if

the judge is sued for the discharge of a secretary, he is sued for an act in an administrative function and not for anything flowing out of his judicial function.

The Consumers Union, Pulliam, and Forrester cases have advanced and changed the laws regarding judicial immunity as ruled in the Stump case. The Consumers Union case is important because it identifies another immunity as relevant to the judiciary, that is, legislative immunity, and contains the strong dicta that judges may be enjoined for enforcement misconduct. The Pulliam case establishes the law that prospective declaratory judgments and injunctions, with attorney fees to the prevailing plaintiff, are appropriate in §1983 even under facts where the Defendant Judge is

protected from damages because of judicial immunity. The Forrester case holds that a judge may be liable in his administrative function for discharging an employee.

The functional approach is discussed again by this Court in the Antoine case. In discussing the reporter's function in the court room, this Court states that the job "requires no discretionary judgment." Antoine v Byers & Anderson, Inc., supra, 124 L Ed 2 391, at 395. At page 399 this Court discusses in detail the policy of this Court in protecting by judicial immunity the function of "discretionary decision making that the doctrine of judicial immunity is designed to protect." It is this discretionary "independent and impartial exercise of judgment vital to the judiciary" that "might be impaired by exposure to potential damages liability"

It is the opinion of this brief writer that the allegations against the defendant judge in this case are allegations of actions that do not rise to the level of discretionary, independent, and impartial exercise of judgment. They are rules applied, without foresight or judgment. They are unconstitutional rules, denying due process and access to the courts. Los Angeles County Bar Ass'n v. Eu, 979 F 2d 697, 706 (9th Cir. 1992); Chrissy F. By Medley v. Mississippi DPW, 780 F Supp 1104, 1126-7 (S.D. Miss 1991). No adjudication is made in the application of his rules. No discretion is exercised; no evidence is heard, no findings are made.

When a decision is made not to hear a case at all, the decision is administrative, not adjudicatory. In

Public Citizen, Inc. v. Miller, 813 F. Supp 821 (N.D. Ga. 1993), a parol board refused to hold a hearing. The court stated, at page 820, that "Defendants made a decision, independent of the merits of Plaintiff's application, not even to consider the application. Such a decision is administrative in nature, and not adjudicatory."

In the Consumers Union case, this Court correctly ruled that a state Supreme Court in promulgating rules for lawyers, is acting in a legislative function, not in an adjudicatory function. As stated in Tenney v Brandhove, 341 U.S. 367, 71 S Ct 783, 95 L.Ed. 1019 (1951), the policy behind legislative immunity is to protect legislators from "deterrents to the uninhibited discharge of their legislative duty. . ."

But legislative immunity, like judicial immunity, can be lost when the actors are not performing within that function, or with total absence of subject matter jurisdiction.

A mayor exercising a veto power has been held to have legislative immunity. Hernandez v City of Lafayette, 643 F. 2d 1138, 1194 (5th Cir. 1981); Calhoun v St. Bernard Parish, 937 F. 2d 172 (5th Cir. 1991) However, a major has been held to have acted without authority when he implemented a policy to take away the right of citizens to apply for handgun licenses. Kellogg v. City of Gary, 562 N.E.2d 685 (Ind. 1990) In House Speaker v Governor, 195 Mich App 376, 384-385; 491 NW2d 832 (1992), the Michigan Court of Appeals ruled that the Governor, and legislators, are not immune "when acting

outside their 'sphere' of authority."

In Michigan, as in other states as well, the authority for adopting court rules is in the Supreme Court. Article 6, Section 5, of the Michigan Constitution, provides that "The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure of all courts of this state." Abick v State of Michigan, 607 F Supp 687 (D.C. Mich. 1985); Alia v Michigan Supreme Court, 906 F 2d 1100 (6th Cir. 1990).

MCR 7.208 entitled "Authority of Court or Tribunal Appealed From" provides as follows: "(A) Limitations. After a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order appealed from except by order of the Court of Appeals, by

stipulation of the parties, or as otherwise provided by law." revised as of January, 1994.

"When a party objects to a Friend of the Court recommendation regarding a change in custody, a court cannot permanently change custody without first holding a hearing de novo." Crampton v Crampton, 178 Mich App 362, 363, 443 NW2d 419 (1989); Mann v Mann, supra.

The opinion of the Court of Appeals in this case and also in the case of Sparks v. Character and Fitness Committee of Kentucky, et al, 859 F2d 428 (1988) shows that the Sixth Circuit's views on judicial immunity are far more limiting (that is, immunity granted more broadly) than the decisions of the United States Supreme Court intended.

Therefore, as a summary to this

section, the complaint pleads a cause of action from three different analyses.

Judge Conlin is acting in an administrative function (not adjudicating) (1) when he implements administrative recommendations prior to holding any hearing, and (2) when he requires money to be paid before a litigant could have a hearing.

Judge Conlin is acting without subject matter jurisdiction when he continues to adjudicate while cases are pending in the Court of Appeals.

Judge Conlin is acting without subject matter jurisdiction when he legislates, makes his own rules, contrary to Michigan Court Rules, and Michigan law.

IV. The Court of Appeals opinion, apparently not wanting to rule for

plaintiffs with regard to the request for prospective declaratory and injunctive relief even when a judge is protected by judicial immunity, erroneously, and in conflict with several other circuits, dismissed the prayer for declaratory and injunctive remedies by application of the Younger Doctrine.

Even when a judge is immune from damages for his judicial acts, declaratory relief and injunctive relief is available to plaintiffs to protect against the prospective invasion of constitutional rights. Supreme Court of Virginia v Consumers Union, supra; Pulliam v Allen, supra; Slavin v Curry, 574 F2d 1256 (CA5, 1978); Hansen v Ahlgrimm, 520 F2d 768 (CA7, 1975). Holeman v Elliott, 732 Fed Supp 726 (D.C. Texas 1990); Guerin v

Riley, 573 Fed Supp 573 (D.C. NJ 1983); Fowler v Alexander, 478 F2d 694 (CA4 1973).

The Younger doctrine test, as explained in Carras v Williams, 807 F2d 1286, 1290 (CA6, 1986), requires (1) that a federal court is called upon to enjoin an ongoing state case, (2) the proceeding implicates vital state interest, and (3) the proceeding provides an adequate opportunity to raise constitutional challenges.

The Younger abstention doctrine is applied to cases where there is state interest in the issue and the federal courts want to let the state courts act first. A recent example is found in the issue decided in Mead v Batchlor, 435 Mich 480; 460 NW2d 493 (1990). In that case the Michigan Supreme Court following the

case of Lassiter v Department of Social Services, 452 US 18, 101 S Ct 2153, 58 L Ed2d 640 (1980), ruled that persons who face possible incarceration for non payment of child support are entitled to appointed counsel. That has been the law as it developed around the United States; however, Michigan was one of the later states to adopt it. The Western District of Michigan following the Younger Abstention Doctrine in Cobb v Green, 611 F Supp 873 (WD Mich, 1985), declined to decide the issue, deferring to the Michigan Supreme Court; however, later, the Eastern District of Michigan in McKinstry v Genesee County Circuit Judges, 669 F Supp 801 (ED Mich, 1987) did not follow the abstention doctrine on the same issue and required the "Michigan court to comply with the constitutional

requirements."

The above example was relied upon by Defendant, and by the District Judge in the Order of Dismissal. It was not a §1983 case.

The abstention doctrine established in Younger v Harris, 401 US 37, 91 S Ct 746, 27 L Ed2d 669 (1971) is not applicable to cases arising out of Title 42, §198. Stradley v Anderson, 456 F2d 1063 (CA8, Neb, 1972); Douglas Research and Chemical Inc. v Solomon, 388 F Supp 433 (ED Mich, 1975); Brown v Bronstein, 389 F Supp 1328 (SD NY, 1975); Donohoe Construction Co. v Maryland-National Capital Park & Planning Commission, 398 F Supp 21 (DC Md, 1975). This Court declined to reach the question of the applicability of Younger v Harris, to §1983 damages cases in Deakins v Monaghan,

484 US 193, 98 L Ed 2d 529; 108 S Ct 523 (1988).

In deciding that the Younger Doctrine prevented the District Court from considering the granting of declaratory or injunctive relief, the Court of Appeals cited Parker v Turner, 626 F.2d 1, (6th Cir. 1980) The dissent in the Parker cases notes that the Younger doctrine should not apply when the plaintiff seeks no interference with pending state court cases. In fact, it is noteworthy that Justice Boggs, the author of the opinion in this case, asked undersigned counsel at oral argument if Plaintiffs sought injunctive relief in pending cases, and was given the answer "no."

Neither the Court of Appeals nor the District Judge discussed the issue of the inapplicability of the abstention doctrine

to § 1983 cases. Instead the Court of Appeals chose to inaccurately characterize the request for declaratory and injunctive relief in terms of the named plaintiffs having pending cases in the Michigan Court of Appeals.

The decision of the Court of Appeals regarding Younger continues the error that permeates the entire opinion, that is, that the class nature of the complaint, and the continuing application of the unconstitutional rules, adopted by the defendant judge, without any subject matter authority, continue to be applied in the defendant's court room.

Compare the case of Page v. Grady, 788 F Supp 1207, 1213, (M.D. Ga. 1992) wherein the judge specifically notes that the "Plaintiffs do not allege that the allegedly unconstitutional acts of

Defendant Owens are part of a pattern of conduct or that others are similarly situated to them." Justice Boggs in this case makes no reference, in his opinion, to the class action allegations of the complaint. The complaint contains extensive allegations of the unauthorized, unconstitutional rule-making, and of the pattern of conduct towards others similarly situated.

There is a clear inconsistency between applying the Younger Doctrine to Title 42, §1983 cases, and the decisions of this Court in Supreme Court of Virginia v. Consumers Union, supra, and Pulliam v Allen, supra. In both cases this Court recognized that declaratory and injunctive relief was appropriate even in cases where the judge enjoyed judicial immunity while acting in an adjudicative function.

Declaratory judgments and injunctions are essential to restrain a judge from carrying out unconstitutional practices in his court room. Pulliam v Allen, supra; Timmerman v. Brown, 528 F.2d 811, 814 (4th Cir, 1975), rev'd on other grounds, Leeke v. Timmerman, 454 U.S. 83 (1981)

As noted by Stephen J. Spapiro, in his article entitled "The Propriety of Prospective Relief and Attorney's Fees Awards Against State-Court Judges in Federal Civil Rights Actions," Akron Law Review, Vol 17:1, page 25, 33-34, "if the judge's error was a single isolated incident, declaratory or injunctive relief may still be denied on the principle of mootness. . . . On the other hand, if a judge is engaged in a continued pattern of unconstitutional action, . . . the judge should not be immune from a declaratory or

injunctive suit brought to halt such action. Although the number of such suits should be small, the necessity for them in some cases may be very great."

The Younger abstention doctrine is not applicable to the facts alleged. The federal forum in which this case was filed is the court that has the jurisdiction, and the responsibility, to hear this §1983 case action for damages and for prospective declaratory and injunctive relief.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

DATED: July 13, 1994

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